

Eric D. Houser (SBN 130079)
 Bethany R. Burrill (SBN 294088)
 HOUSER & ALLISON
 A Professional Corporation
 9970 Research Drive,
 Irvine, California 92618
 Telephone: (949) 679-1111
 Facsimile: (949) 679-1112

Attorneys for Defendant
 Ocwen Loan Servicing LLC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN R. CHASE, an individual,	) Case No.: 2:15-cv-9224-BRO(AGR _x)
)
Plaintiff,)
	) NOTICE OF MOTION AND MOTION TO
v.	) DISMISS PLAINTIFF'S FIRST
	) AMENDED COMPLAINT FOR FAILURE
OCWEN LOAN SERVICING, LLC, a business	) TO STATE A CLAIM UPON WHICH
entity form unknown; LAW OFFICES OF LES	) RELIEF CAN BE GRANTED
ZIEVE, a business entity form unknown, and)
DOES 1 through 100, inclusive,	) [FRCP Rule 12(b)(6)]
)
Defendants.	) Date: January 25, 2016
	) Time: 1:30 p.m.
	) Ctrm.: 14
	) Judge: Beverly Reid O'Connell
)
	) <i>[Filed concurrently with Request for Judicial</i>
	) <i>Order and Proposed Order]</i>
)
)
)

TO THE CLERK OF THIS COURT AND ALL PARTIES AND
THEIR ATTORNEYS OF RECORD, IF ANY:

1 **PLEASE TAKE NOTICE** that on January 25, 2016 at 1:30 p.m. in
2 Courtroom 14, of the above-entitled Court, located at 312 N. Spring Street, Los
3 Angeles, California 90012-4701, Defendant, Ocwen Loan Servicing, LLC
4 ("Ocwen") will move this court for an Order dismissing Plaintiff John R. Chase's
5 ("Chase" or "Plaintiff") First Amended Complaint ("FAC") pursuant to Federal
6 Rule of Civil Procedure ("FRCP") Rule 12(b)(6) for failing to state a claim upon
7 which relief can be granted. This motion is made on the grounds that Plaintiff has
8 failed to plead the essential facts which give rise to his claims and/or the claims
9 are barred on their face, as confirmed by matters which may be properly judicially
10 noticed by this court.
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14 This motion is based upon this notice of motion and motion, the attached
15 memorandum of points and authorities, the complete files and records in this
16 action, the Request for Judicial Notice filed concurrently herewith, the oral
17 argument of counsel and upon such other and further evidence as this court might
18 deem proper.
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21 Pursuant to Local Rule 7.3, Ocwen's counsel contacted Plaintiff's counsel
22 to discuss Plaintiff's allegations in the complaint and the FAC, the Motion, and
23 potential resolution thereof. Ocwen's counsel is still attempting to engage in
24 settlement discussions with Plaintiff's counsel, but files this Motion in compliance
25 with the deadlines set forth by Federal Rules of Civil Procedure.
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1 Dated: December 28, 2015

2 Respectfully submitted,

3 **HOUSER & ALLISON, APC**

4 /s/ Bethany R. Burrill

5 Eric D. Houser, Esq.

6 Bethany R. Burrill, Esq.

7 Attorneys for Ocwen Loan Servicing, LLC

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. FACTUAL HISTORY AND ALLEGATIONS OF THE FAC	2
III. LEGAL STANDARD	4
IV. ANALYSIS.....	5
A. PLAINTIFF’S FIRST CLAIM FOR VIOLATION OF	
CALIFORNIA CIVIL CODE SECTION 2923.6 FAILS.....	5
B. PLAINTIFF’S SECOND CLAIM FOR VIOLATION OF THE	
CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION	
17200 ALSO FAILS.....	8
C. PLAINTIFF’S CLAIM OF NEGLIGENCE FAILS.....	9
D. PLAINTIFF’S CLAIM FOR NEGLIGENT	
MISREPRESENTATION FAILS.....	11
E. PLAINTIFF’S FIFTH CLAIM FOR RELIEF FOR BREACH OF	
CONTRACT FAILS.....	12
F. PLAINTIFF’S SIXTH CLAIM FOR RELIEF FOR BREACH OF	
THE COVENANT OF GOOD FAITH AND FAIR DEALING	
FAILS.....	14
V. CONCLUSION	15

TABLE OF AUTHORITIES

Cases

<i>Aleksick v. 7-Eleven, Inc.</i>	205 Cal.App.4th 1176, 1185 (2012).....	9
<i>Alexander v. Codemasters Group Limited</i> ,	104 Cal.App.4th 129, 141 (2002)	13
<i>Ashcroft v. Iqbal</i> ,	556 U.S. 662 (2009).....	4
<i>Balistreri v. Pacifica Police Department</i> ,	855 F.2d 1421, 1424 (9th Cir. 1988)	4
<i>Bentley v. Mountain</i> ,	51 Cal.App.2d 95, 98 (1942).....	13
<i>Bower v. AT&T Mobility, LLC</i> ,	196 Cal. App. 4th 1545, 1554 (2011).....	8
<i>Branch v. Tunnell</i> ,	14 F.3d 449,453-54 (9th Cir. 1994).....	5
<i>Careau & Co. v. Security Pacific Business Credit, Inc.</i>	222 Cal.App.3d 1371, 1395	
(1990)		14
<i>Conley v. Gibson</i> ,	355 U.S. 41, 45-46 (1957).....	4
<i>Dumas v. Kipp</i> ,	90 F.3d 386, 393 (9th Cir. 1996)	5
<i>Durell v. Sharp Healthcare</i>)	183 Cal.App.4th 1350, 1368-1369 (2010).....	13
<i>Durning v. First Boston Corp.</i> ,	815 F.2d 1265, 1267 (9th Cir. 1987).....	5
<i>Fox v. Pollack</i> ,	181 Cal. App. 3d 954, 962 (1986).....	11
<i>Gillespie v. Civiletti</i> ,	629 F.2d 637, 640 (9th Cir. 1980).....	4
<i>Jenkins v. JP Morgan Chase Bank, N.A.</i> ,	216 Cal.App.4th 497, 519, 522 (2013)...	8
<i>Lueras v. BAC Home Loans Servicing, LP</i> ,	221 Cal.App.4th 49 (2013)	10
<i>Moss v. U.S. Secret Service</i> ,	572 F.2d 962, 969 (9th Cir. 2009)	4
<i>Pasadena Live, LLC v. City of Pasadena</i> ,	114 Cal. App. 4th 1089, 1094 (2004)..	15
<i>Racine & Laramie, Ltd. v. Department of Parks and Recreation</i>	11 Cal.App.4th	
1026, 1031-1032, 1039 (1992).....		14
<i>Schulz v. Neovi Data Corp</i> ,	152 Cal. App. 4th 86, 92 (2007)	8
<i>Shepherd v. American Home Mortg. Services, Inc.</i> ,	2009 WL 4505925, at *2 (E.D.	
Cal. 2009)		10
<i>Small v. Fritz Cos., Inc.</i> ,	30 Cal.4th 167.1 173 (2003).....	11
<i>Sprewell v. Golden State Warriors</i> ,	266 F.3d 979, 988 (9th Cir. 2001).....	4

1	<i>Wagner v. Benson</i> , 101 Cal.App.3d 27, 35 (1980)	10
2	<i>Wall Street Network, Ltd. v. New York Times Co.</i> , 164 Cal.App.4th 1171, 1178	
3	(2008)	13

4

5 **Statutes**

6	<i>Bus. & Prof. Code</i> §17204	8
7	<i>Cal. Civ. Code</i> § 2923.6(c)	5
8	<i>Cal. Civ. Code</i> § 2923.6(g)	6
9	<i>Cal. Civ. Code</i> §§2924.18(d), 2924.10(b) and 2923.6(h).....	6
10	FRCP Rule 201	5

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 On or about December 16, 2005, Plaintiff obtained a loan for \$417,000.00.
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5 Plaintiff has been in default on the loan since November 1, 2011 and owes over
6 \$80,000 in arrears. Plaintiff's lawsuit is nothing more than an attempt to frustrate
7 Ocwen Loan Servicing, LLC's ("Ocwen") legal right to proceed with the trustee's
8 sale. Plaintiff was evaluated and afforded more than a fair opportunity to be
9 evaluated for a loan modification prior to recordation of the Notice of Trustee's
10 Sale in compliance with the California Homeowners Bill of Rights ("HBOR").
11 Plaintiff's loan was already modified after he defaulted in 2010. Plaintiff then
12 again defaulted on the 2010 modification agreement and was offered another loan
13 modification in 2012, which Plaintiff failed to accept. Ocwen thereafter reviewed
14 Plaintiff several more times for a loan modification, but was found ineligible.
15 Ocwen sent Plaintiff denial letters in compliance with *Civil Code* §2923.6.
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18 By Plaintiff's own admissions in the FAC, there was no complete loan
19 modification application pending at the time the Notice of Default or the Notice of
20 Trustee's Sale was recorded. Further, contrary to Plaintiff's conclusory allegations,
21 Plaintiff did not experience a material change in his financial circumstances to
22 obligate Ocwen to review his subsequent modification application as alleged in his
23 complaint. Therefore, Ocwen did not violate HBOR or engage in unfair or
24 unlawful practices when it recorded the Notice of Trustee's Sale. Moreover,
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1 Ocwen never misrepresented the status of foreclosure to Plaintiff and Plaintiff has
2 not pled any facts to excuse his non-performance of the loan documents. Because
3 none of Plaintiff's allegations in the FAC against Ocwen are supported by fact or
4 law, Plaintiff's FAC fails to state a claim upon which relief can be granted.
5

6 **II. FACTUAL HISTORY AND ALLEGATIONS OF THE FAC**

7
8 On or about December 16, 2005, Plaintiff obtained a mortgage loan in the
9 principal amount of \$417,000.00 which was memorialized by a Note and secured
10 by a Deed of Trust recorded on January 3, 2006 against the real property located at
11 52 Deer Creek Road, Pomona, California 91766 (the "Loan") (Request for Judicial
12 Notice ("RJN"), Exhibit ("Ex.") A.) After obtaining the Loan, Plaintiff defaulted
13 on his obligations under the Note. (RJN, Ex. I, Tollefson Decl., ¶ 5; FAC, ¶35.)
14 Plaintiff obtained his first modification to the Loan in July 2010 through his prior
15 loan servicer, GMAC Mortgage, Inc. ("GMAC"). (RJN, Ex. I, page 2 and attached
16 Supplemental Declaration of Nicole Tollefson ("Tollefson Decl.", paragraph 7 and
17 Exhibits thereto). Thereafter, Plaintiff defaulted again on the modification
18 agreement. (RJN, Ex. I, Tollefson Decl., ¶ 8.) On August 29, 2012, a Notice of
19 Default was recorded, which stated that as of August 27, 2012, Plaintiff was in
20 default in the amount of \$20,824.49, and remained due for the November 1, 2011
21 payment. (RJN, Ex. D.) In or around December 2012, GMAC reviewed Plaintiff
22 again for another modification and offered Plaintiff a non-HAMP Trial Period
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1 Plan, which Plaintiff failed to accept. (RJN, Ex. I, page 2 and Tollefson Decl., ¶¶ 8
2 and 9 and Exhibits thereto.)

3
4 In or about February 2013, the servicing rights of the Loan were transferred
5 from GMAC to Ocwen. (RJN, Ex. I.) Ocwen reviewed Plaintiff several times for a
6 loan modification, but was found ineligible. (RJN, Ex. K, page 2 and Tollefson
7 Decl., ¶¶ 10-13 and Exhibits thereto.) Written denials were sent to Plaintiff. (*Id.*;
8 Ex. K.) Ocwen received another partial application from Plaintiff in or around
9 November 2014. (RJN, Ex. K, page 2 and Tollefson Decl., ¶¶ 14-15 and Exhibits
10 thereto.) As of February 17, 2015, Plaintiff failed to submit a complete application
11 and Ocwen advised Plaintiff of same several times in writing. (RJN, Ex. K,
12 Tollefson Decl., ¶ 16, and Exhibits thereto.) Therefore, on February 23, 2015, a
13 Notice of Trustee's Sale ("NOTS") was recorded, setting the foreclosure sale to
14 occur on March 16, 2015. (RJN, Ex. G). Plaintiff's income remained constant
15 through all loan modification applications submitted to Ocwen, and Plaintiff never
16 submitted any documentation to Ocwen showing otherwise. (RJN, Ex. K,
17 Tollefson Decl., ¶¶ 19-20.)

18
19 On March 5, 2015, Plaintiff filed this action in State Court and on March 11,
20 2015, Plaintiff obtained a temporary restraining order stopping the foreclosure
21 sale. (RJN, Ex. H.) To date, the foreclosure sale has not occurred. Shortly before
22 this case was removed to federal court, Plaintiff amended the complaint to add
23 Residential Credit Solutions, Inc. ("RCS") as a DOE defendant. Thereafter,
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1 Plaintiff filed his FAC. The FAC's allegations are the same as those contained in
2 the original complaint, with the exception to a new allegation that Plaintiff was
3 offered a modification in April 2014, but it was allegedly not sent the offer until
4 two weeks prior to the acceptance deadline. The FAC offers no factual support for
5 any of the allegations contained in the FAC.
6

7 **III. LEGAL STANDARD**

8
9 Pursuant to the Federal Rules of Civil Procedure Rule 12(b)(6), a complaint
10 may be dismissed if it appears beyond doubt that plaintiff can prove no set of facts
11 in support of a claim which would entitle plaintiff to relief. *Conley v. Gibson*, 355
12 U.S. 41, 45-46 (1957); *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980).

13
14 Where the claims in a complaint are insufficiently supported by factual allegations,
15 the claims may be disposed of by summary dismissal. *Balistreri v. Pacifica Police*
16 *Department*, 855 F.2d 1421, 1424 (9th Cir. 1988). "[A] cause of action's elements
17 supported by conclusory statements" are insufficient to overcome a motion to
18 dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). To survive a motion to dismiss,
19 the complaint must have non-conclusory factual content from which reasonable
20 inferences can be drawn that are plausibly suggestive of a claim. *Moss v. U.S.*
21 *Secret Service*, 572 F.2d 962, 969 (9th Cir. 2009). A court is not "required to
22 accept as true allegations that are merely conclusory, unwarranted deductions of
23 fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d
24 979, 988 (9th Cir. 2001). Additionally, a court is not limited to the allegations of
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1 the complaint in ruling on a motion to dismiss, but can also consider any
 2 documents attached to the complaint or take judicial notice of recorded loan and
 3 title documents, and their contents, if they are referenced in the complaint, and are
 4 thus deemed incorporated. FRCP Rule 201; *Durning v. First Boston Corp.*, 815
 5 F.2d 1265, 1267 (9th Cir. 1987); *Branch v. Tunnell*, 14 F.3d 449,453-54 (9th Cir.
 6 1994), overruled on other grounds. Finally, when amendment would be futile,
 7 dismissal may be ordered with prejudice. *Dumas v. Kipp*, 90 F.3d 386, 393 (9th
 8 Cir. 1996).

11 IV. ANALYSIS

13 A. PLAINTIFF'S FIRST CLAIM FOR VIOLATION OF CALIFORNIA 14 CIVIL CODE SECTION 2923.6 FAILS.

15 Plaintiff's claim for violation of Section 2923.6 fails because he did not
 16 submit a complete modification application. *California Civil Code* Section
 17 2923.6(c) provides, in relevant part, that "If a borrower submits a **complete**
 18 application for a first lien loan modification...a mortgage servicer, mortgagee,
 19 trustee, beneficiary, or authorized agent shall not record a notice of default or
 20 notice of sale or conduct a trustee's sale" while the complete first lien loan
 21 modification application is pending. *Cal. Civ. Code* § 2923.6(c) (emphasis added).
 22 **A loan modification application is deemed to be "complete" when a borrower**
 23 **has supplied the mortgage servicer with all documents required by the**
 24 **mortgage servicer** within reasonable timeframes specified by the mortgage
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servicer.” *Cal. Civ. Code* §§2924.18(d), 2924.10(b) and 2923.6(h). Accordingly, Section 2923.6(c) only applies when a **complete** modification application is submitted and pending.

Here, Plaintiff admits in the FAC that his modification application remained incomplete at the time the NOTS was recorded and that Ocwen required further documentation from Plaintiff. (FAC, ¶ 45-53.) Therefore, because there was no complete modification application pending at the time the NOTS was recorded, Section 2923.6 does not apply and Plaintiff claim fails.

Moreover, Plaintiff’s claim fails because Subsection 2923.6(g) expressly prevents borrowers like Plaintiff from submitting multiple modification applications in attempt to delay foreclosure. In relevant part, Section 2923.6(g) states:

In order to minimize the risk of borrowers submitting multiple applications for first lien loan modifications for the purpose of delay, **the mortgage servicer shall not be obligated to evaluate applications from borrowers who have already been evaluated or afforded a fair opportunity to be evaluated for a first lien loan modification prior to January 1, 2013, or who have been evaluated or afforded a fair opportunity to be evaluated consistent with the requirements of this section, unless there has been a material change in the borrower's financial circumstances since the date of the borrower's previous application and that change is documented by the borrower and submitted to the mortgage servicer.**

Cal. Civ. Code § 2923.6(g) (emphasis added).

1 Here, Plaintiff had been evaluated and afforded more than a fair
2 opportunity to be evaluated for a loan modification multiple times prior to the
3 Notice of Trustee's Sale being recorded. (Ex. I, Tollefson Decl., ¶¶ 7, 8, 11, 13,
4 15.) Plaintiff's loan was modified after he defaulted in 2010. Plaintiff was offered
5 another loan modification in December 2012 after he defaulted on the 2010
6 modification agreement. [Ex. I, Tollefson Decl., ¶¶ 7-8.] However, Plaintiff failed
7 to accept the modification offer. [Ex. I, Tollefson Decl., ¶ 9.] Thereafter, Ocwen
8 reviewed Plaintiff for a loan modification several more times in 2014 but was
9 found ineligible for a modification. [Ex. I, Tollefson Decl., ¶¶ 10-11, 12-13, 14-
10 15.] The last denial letter that Ocwen sent to Plaintiff, which was in compliance
11 with *Civil Code* §2923.6, was on or about August 22, 2014. [Ex. I, Tollefson Decl.
12 Exhibit 9] The Notice of Trustee's Sale was not recorded until several months
13 after the last denial appeal period expired.

14 Further, the FAC's allegations regarding Plaintiff experiencing a material
15 change in his income are solely conclusory with no factual basis. There are no
16 facts alleged that Plaintiff ever supplied any loan modification application to either
17 Ocwen or Ocwen evincing any of the alleged changes from March 2014 to date.
18 To the contrary, the record shows that Plaintiff never experienced a material
19 change in his income in or about September 2014, or any other time for that
20 matter, to entitle him to another review. (Ex. I, Tollefson Decl., ¶19-20 and
21 Exhibits thereto.) Even if there was a material change in Plaintiff's circumstances,
22

1 Plaintiff was still denied for a modification after he submitted several more
 2 modification applications that included documentation of his alleged “material
 3 change” in income. (Ex. L.) Regardless, the FAC establishes that there was no
 4 complete application pending at the time the NOTS was recorded. Therefore,
 5 Plaintiff’s first claim fails. Even if Plaintiff could state a claim, he is only entitled
 6 to injunctive relief, not the damages he seeks in the FAC, under the statutory
 7 scheme.
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10 **B. PLAINTIFF’S SECOND CLAIM FOR VIOLATION OF THE**
 11 **CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION**
 12 **17200 ALSO FAILS.**

13 Plaintiff cannot maintain a *California Business and Professions Code*
 14 Section 17200 ("UCL") claim because no evidence exists that Plaintiff suffered
 15 economic injury and that such injury was caused by the unfair/unlawful practice of
 16 Ocwen’s. (*See Bus. & Prof. Code* §17204; *Schulz v. Neovi Data Corp*, 152 Cal.
 17 App. 4th 86, 92 (2007) [noting plaintiff must allege specific wrongful conduct of
 18 each defendant].) Standing to sue under the UCL is limited to any "person who
 19 has suffered injury in fact and has lost money or property" as a result of unfair
 20 competition. *Bower v. AT&T Mobility, LLC*, 196 Cal. App. 4th 1545, 1554 (2011).
 21 “A plaintiff fails to satisfy the causation prong of the statute if he or she would
 22 have suffered ‘the same harm whether or not a defendant complied with the law.’”
 23 *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal.App.4th 497, 519, 522 (2013)
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1 (plaintiff's UCL claim failed because admitted she defaulted on the loan and that
2 the default occurred before the defendants' alleged unlawful acts.)

3
4 Here, like *Jenkins*, Plaintiff's default triggered the lawful enforcement of the
5 power of sale clause in the Deed of Trust, and it was the triggering of the power of
6 sale clause that subjected the Property to foreclosure. (*See Id.* at p. 523.) Because
7 default occurred before any of Ocwen's allegedly wrongful actions, Plaintiff
8 cannot assert the impending foreclosure of the Property was caused by Ocwen's
9 wrongful actions or show a causal link to his economic injury. As such, Plaintiff
10 cannot establish standing to bring a UCL claim.
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13 Further, Plaintiff's UCL claim is based on the same allegations as his failed
14 Section 2923.6 statutory claim and is therefore derivative of those claims. (FAC, ¶¶
15 95-99). When the underlying cause of action fails, a derivative UCL claim also
16 fails. (*Aleksick v. 7-Eleven, Inc.* 205 Cal.App.4th 1176, 1185 (2012) ["When a
17 statutory claim fails, a derivative UCL claim also fails."]) Because all of
18 Plaintiff's predicate causes of action fail, his UCL cause of action also fails. Since
19 FAC is completely devoid of any facts that Ocwen engaged in any fraudulent,
20 unfair or unlawful practice, this claim for relief fails.
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23 **C. PLAINTIFF'S CLAIM OF NEGLIGENCE FAILS.**

24 Plaintiff cannot establish a claim for Negligence and the allegations in the
25 FAC do not amount to Negligent Misrepresentation. "The existence of a duty of
26 care owed by a defendant to a plaintiff is a prerequisite to establishing a claim for
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1 negligence." *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal.App.4th 49
 2 (2013). "Loan servicers do not owe a duty to the borrowers of the loans they
 3 service." *Shepherd v. American Home Mortg. Services, Inc.*, 2009 WL 4505925, at
 4 *2 (E.D. Cal. 2009). "Liability to a borrower for negligence arises only when the
 5 lender 'actively participates' in the financed enterprise 'beyond the domain of the
 6 usual money lender.'" *Wagner v. Benson*, 101 Cal.App.3d 27, 35 (1980). The
 7 offering or consideration of home loan modifications are sufficiently connected to
 8 conventional lending transactions as to come within the scope of a bank's
 9 conventional role as a mere lender of money. *Lueras*, 221 Cal.App.4th at 67.¹ The
 10 *Lueras* court held that a mortgage servicer did not have a duty of care to handle a
 11 borrower's loan in such a way to prevent foreclosure. *Id.* at 68. The court reasoned
 12 that a mortgage servicer's duties, if any, "are imposed by the loan documents and
 13 the Forbearance Agreement, statutes, or regulations. If [the mortgage servicer]
 14 failed to 'follow through' on those agreements, then [plaintiff's] remedy lies in a
 15 breach of contract, not negligence." *Id.*

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 21 Here, Plaintiff's allegations are not unique to those in *Lueras* and do not
 22 justify a deviation from the general rule that mortgage servicers and borrowers
 23 operate at arm's length. As in *Lueras*, Ocwen did not exceed the scope of its
 24 conventional role as a loan servicer and therefore, Ocwen owed no duty to
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26
 27 ¹ The *Lueras* court reasoned, "If the lender did not place the borrower in a position creating a need for a loan
 28 modification, then no moral blame would be attached to the lender's conduct." *Lueras*, 221 Cal.App.4th at 67.

1 Plaintiff. Moreover, because Plaintiff was afforded more than a fair opportunity to
2 be evaluated for a loan modification, it would be contrary to the intent of Section
3 2923.6 to find that Ocwen owed Plaintiff a duty of care to review Plaintiff's
4 subsequent application for yet another loan modification prior to recording the
5 NOTS. Further, Plaintiff has provided no evidence to meet his burden to show that
6 Ocwen affirmatively mishandled his application. Rather, the FAC's allegations
7 reveals that Ocwen tried to work with Plaintiff to help him submit a complete
8 application. It was the fault of Plaintiff, not Ocwen, that Plaintiff did not submit a
9 complete application.
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13 **D. PLAINTIFF'S CLAIM FOR NEGLIGENT MISREPRESENTATION**
14 **FAILS.**

15 Plaintiff cannot establish a claim for negligent misrepresentation. Negligent
16 misrepresentation is a form of deceit, the elements of which consist of (1) the
17 misrepresentation of a past or existing material fact, (2) without reasonable ground
18 for believing it to be true, (3) with intent to induce another's reliance on the fact
19 misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting
20 damage." *Fox v. Pollack*, 181 Cal. App. 3d 954, 962 (1986). Negligent
21 misrepresentation replaces the scienter requirement with a requirement that the
22 defendant have "no reasonable ground" for believing the representation to be true.
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24 *Small v. Fritz Cos., Inc.*, 30 Cal.4th 167.1 173 (2003).
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1 Here, Ocwen has made no misrepresentations of any kind to Plaintiff
2 regarding his loan modification applications or the status of the foreclosure.
3 Nothing in the FAC amounts to a misrepresentation. The loan modification
4 application that Plaintiff submitted after his November 19, 2014 denial was
5 incomplete. Plaintiff does not allege that Ocwen represented to him that they
6 would not continue to foreclose on his property while his application remained
7 incomplete. Rather, Plaintiff only alleges that Ocwen informed him that there was
8 no foreclosure sale date set as of December 16, 2014. [FAC, ¶ 46.] Ocwen did not
9 set a foreclosure sale date on Plaintiff's property until February 18, 2015. [Ex. I,
10 Tollefson Decl., ¶ 16.] Further, Ocwen informed Plaintiff in a written notice that
11 Ocwen may continue advancing the foreclosure sale process on his property while
12 his application remained incomplete. [Ex. I, Tollefson Decl. Exhibit 11.]
13 Therefore, contrary to Plaintiff's allegations, Ocwen did not misrepresent the
14 status of the foreclosure of his property. Because Plaintiff fails to allege facts with
15 the requisite specificity to establish negligent representation, this claim fails.
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21 **E. PLAINTIFF'S FIFTH CLAIM FOR RELIEF FOR BREACH OF**
22 **CONTRACT FAILS.**

23 Plaintiff's own non-performance precludes his fifth and sixth claims. "The
24 standard elements of a claim for breach of contract are: '(1) the contract, (2)
25 plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and
26 (4) damage to plaintiff therefrom.'" *Wall Street Network, Ltd. v. New York Times*
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1 Co., 164 Cal.App.4th 1171, 1178 (2008). "To form a contract, an 'offer must be
 2 sufficiently definite ... that the performance promised is reasonably certain."
 3
 4 *Alexander v. Codemasters Group Limited*, 104 Cal.App.4th 129, 141 (2002). "The
 5 allegations of the amended complaint to the effect that defendants 'violated' said
 6 contracts, or 'caused the violation' of said contracts by others, are allegations of
 7 fact showing such violations." *Bentley v. Mountain*, 51 Cal.App.2d 95, 98 (1942).
 8
 9 A plaintiff cannot partially satisfy its obligations under a contract, then bring a
 10 claim for breach of contract to obtain the benefit thereof. *Durell v. Sharp*
 11 *Healthcare*) 183 Cal.App.4th 1350, 1368-1369 (2010). A complaint cannot state a
 12
 13 cause of action for breach of contract where the plaintiff has not specifically
 14 pleaded an excuse for nonperformance. *Id.* "One party to a contract cannot
 15 compel another to perform while he himself is in default." *Id.* at 1367.

17 Plaintiff enjoyed the full benefit of the contract when the loan proceeds were
 18 dispersed. Therefore, Plaintiff's breach of contract cause of action fails because
 19 Plaintiff does not and cannot allege that he fully complied with the terms of the
 20 Note and Deed of Trust as he admits he was in default. (FAC, ¶ 35.) Plaintiff also
 21
 22 does not and cannot allege that his performance was excused. Plaintiff cannot
 23 partially satisfy his obligations under the Note and Deed of Trust and then bring a
 24 claim for breach of contract to obtain the benefit thereof. Likewise, Plaintiff
 25 admits that he did not perform under the "loan modification offer" which Ocwen
 26 allegedly made. In a letter from Plaintiff to Ocwen dated September 11, 2014,
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1 Plaintiff states that he could not afford the modified payments offered and
2 requested to be reviewed again for a modification and offered payments closer to
3 his original contracted payments. (Ex. K.) This letter also establishes that Plaintiff
4 had no intention of accepting the alleged modification offer and therefore negates
5 any allegation of damages. Because Plaintiff did not accept the alleged
6 modification offer to form a contract.
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9 **F. PLAINTIFF'S SIXTH CLAIM FOR RELIEF FOR BREACH OF THE**
10 **COVENANT OF GOOD FAITH AND FAIR DEALING FAILS.**

11 Plaintiff's claim for breach of the covenant of good faith and fair dealing
12 relies solely on his other failed claims. To succeed on a cause of action for breach
13 of the implied covenant of good faith and fair dealing, Plaintiff must present
14 allegations that there was: (1) the existence of some specific contractual
15 obligation; and (2) interference with Plaintiff's performance of the contract or
16 failure to cooperate with the plaintiff. *Racine & Laramie, Ltd. v. Department of*
17 *Parks and Recreation* 11 Cal.App.4th 1026, 1031-1032, 1039 (1992). "The
18 implied covenant of good faith and fair dealing rests upon the existence of some
19 specific contractual obligation." *Id.* at 1031-1032. "Allegations which assert such a
20 claim must show that the conduct of the defendant...demonstrates a failure or
21 refusal to discharge contractual responsibilities...by a conscious and deliberate
22 act." *Careau & Co. v. Security Pacific Business Credit, Inc.* 222 Cal.App.3d
23 1371, 1395 (1990). Because the terms of the Deed of Trust specifically permit
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1 foreclosure upon default, Plaintiff cannot allege breach of the implied covenant
 2 based on the enforcement of the Deed of Trust and recordation of the NOD.
 3 *Pasadena Live, LLC v. City of Pasadena*, 114 Cal. App. 4th 1089, 1094 (2004)
 4 ("[t]he implied covenant of good faith and fair dealing is limited to assuring
 5 compliance with the express terms of the contract, and cannot be extended to
 6 create obligations not contemplated by the contract.")
 7
 8

9 Accordingly, Plaintiff cannot maintain a claim for Breach of the Implied
 10 Covenant under California law. For reasons stated above, it was the fault of
 11 Plaintiff, not Ocwen, that he failed to cure his default. As such, Plaintiff cannot
 12 maintain his sixth claim.
 13

14 **V. CONCLUSION**

15 For all of the reasons discussed above, Ocwen respectfully requests that the
 16 court grant this Motion to Dismiss in its entirety with prejudice and without leave
 17 to amend.
 18

19
 20
 21 Dated: December 28, 2015

Respectively Submitted,
HOUSER & ALLISON, APC
/s/ Bethany R. Burrill
 Bethany R. Burrill
 Attorneys for Defendant
 Ocwen Loan Servicing, LLC

